Alaska Pulp Corporation *and* United Paperworkers International Union, AFL–CIO. Case 19–CA–20039

September 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 20, 1989, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent and the General Counsel filed exceptions and cross-exceptions, respectively, and supporting briefs.[1] The General Counsel also filed a brief in response to the Respondent's exceptions.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.[4]

We agree with the judge that the Respondent, inter alia, violated Section 8(a)(1) of the Act when, in its letter of July 20, 1988, to employees Lawson, Jones, and other unreinstated strikers, it informed them that their reinstatement rights would be considered abandoned if they did not furnish it with information concerning their work experience since July 11, 1986. Although in its brief the Respondent suggests that the information sought concerning strikers' interim employment could serve ''as an aid to determine how employees might fit into the multi-craft system,'' it nevertheless concedes that, as the judge found, such information was not pertinent to the performance of the jobs to which the strikers could have been reinstated. Thus, in adopting the judge's 8(a)(1) finding in this regard, we rely solely on the fact that the Respondent failed to demonstrate that it had legitimate and substantial business justifications for requiring such information from the unreinstated strikers as a condition to making reinstatement offers to them. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alaska Pulp Corporation, Sitka, Alaska, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent also filed a ''Motion For Remand and to Reopen the Record to Consider Additional Evidence Regarding Jones and Lawson,'' which the General Counsel opposes. In support of its motion, the Respondent submits an affidavit from its vice president of industrial relations, Jess Cline, dated November 21, 1989, which purports to show that employee Jones declined to provide the Respondent with a medical release or to submit to a physical examination by company doctors in connection with an offer of reinstatement made to him on October 20, 1989, and that employee Lawson voluntarily quit his employment 1 day after being reinstated on October 16, 1989. Having duly considered the matter, we find that the issues raised by the Respondent's motion have no bearing on the question whether the Respondent unlawfully refused to make either Jones or Lawson an offer of reinstatement during their August 1987 meeting with Cline, but instead raise compliance matters that can best be resolved at that stage of the proceedings. Accordingly, the Respondent's motion is denied.

[2] The General Counsel has filed a motion to strike the Respondent's exceptions and brief on the grounds that they fail to conform to Sec. 102.46 of the Board's Rules and Regulations, and because the Respondent's brief combines arguments in support of exceptions with arguments made in its motion for remand and to reopen the record, discussed supra. The Respondent filed a response to the General Counsel's motion. Having duly considered the matter, we find that the Respondent's exceptions and brief substantially comply with Sec. 102.46 of the Board's Rules and Regulations, as amended. Accordingly, the General Counsel's motion to strike the Respondent's exceptions and brief is denied. However, in considering the Respondent's brief in support of exceptions, we have not considered any arguments contained therein which were raised by the Respondent in its motion to remand and reopen the record.

[3] In agreeing with the judge's finding that employee Bartels was unlawfully passed over for reinstatement by the Respondent in May 1988, we find it unnecessary to rely on the judge's statement that Bartels' subsequent acceptance of an apprentice position in January 1989 ''negates any speculation that, had Respondent actually offered Bartels reinstatement in an apprenticeship program in May, he would have rejected that offer.''

The letters sent to Cline by Lawson and Jones on July 27, 1988, state that they wished to remain on the preferential hiring list ''for *my* pre-strike job'' rather than ''for *any* pre-strike job'' as inadvertently stated by the judge. The judge also misstated that Jones began his employment with the Respondent in 1986, rather than in 1962, and that the meeting which Lawson and Jones had with Cline occurred on September 3, rather than August 3, 1988. Correction of these errors does not affect the outcome of this case.

[4] The General Counsel has cross-excepted to the judge's refusal, in fn. 5 of his decision, to order that interest on the backpay owed the discriminatees in this case be calculated on a daily compounded basis. In his supporting brief, the General Counsel requests that the Board change from a simple interest to a daily compounding method of computing interest on backpay and other monetary awards. In a concluding paragraph in its brief, the Respondent opposes the General Counsel's request. Having duly considered the matter, we are not prepared at this time to deviate from our current practice. We are, however, taking the matter under advisement.

[5] We find it unnecessary to rely on the judge's reference to *Charleston Nursing Center*, 257 NLRB 554, 557 (1981), for the general proposition that ''an employer may not require replaced economic strikers to respond to such a request or risk losing their reinstatement rights.''

James C. Sand, for the General Counsel.
Jerome L. Rubin (Schweppe, Krug & Tausend), of Seattle, Washington, appearing for the Respondent.
Florian Sever, of Sitka, Alaska, appearing for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Sitka, Alaska, on May 9 through 11, 1989. On November 30, 1988,[1] the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on October 29, alleging violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[2] on the briefs that were filed by the General Counsel and Re-

[1] Unless stated otherwise, all dates occurred in 1988.

[2] Errors in the transcript have been noted and corrected.

spondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Alaska Pulp Corporation (Respondent) has been an Alaska corporation with office and place of business, inter alia, in Sitka, Alaska, where it engages in the business of operating a wood pulp manufacturing plant. In the course and conduct of its business operations during the 12-month period preceding issuance of the complaint, a representative period, Respondent sold and shipped goods or provided services valued in excess of $50,000 from its Alaska facilities to customers outside that State, or to customers within that State who, in turn, engaged in interstate commerce by other than indirect means. Moreover, during that same period, in the course of its business operations, Respondent purchased, and caused to be transferred and delivered to its Alaska facility, either directly or indirectly, goods and materials valued in excess of $50,000 that originated outside that State. Therefore, I find, as admitted by the answer, that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, United Paperworkers International Union, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

On July 11, 1986, a strike commenced against Respondent by its employees who were represented by the Union. However, the Union was decertified in March 1987. As a result, the employees abandoned the strike and, on or about April 7, 1987, notified Respondent of their desire to return to work.

During the strike, Respondent had continued operating with replacement employees. Consequently, the strikers seeking reinstatement were placed on a preferential recall list. Furthermore, during the strike Respondent had switched from separate craft classifications (i.e., millwright, plumber, etc.) in its maintenance department to a single, multicraft classification entitled general mechanic. Each employee in that classification is expected to, at least, try to perform whatever maintenance work needs to be done in the department or area to which that employee is assigned. Neither the enrollment of former strikers on the preferential recall list nor the switch to a multicraft general mechanic classification has been alleged to have been a violation of the Act.

In effect, this case is a partial continuation of an earlier one involving Respondent. In that case, Judge Gerald A. Wacknov issued a decision [296 NLRB 1260 (1989)], now pending review by the Board, concluding that Respondent had violated the Act in certain respects—most significantly, by failing and refusing to offer qualified unreinstated strikers on the preferential recall list any and all available positions in each department and in each progressive level thereof—and had not violated the Act in certain other respects.

The complaint in the instant case alleges that four formerly striking maintenance employees—Babette ''Becky'' Sisson, John Bartels, John W. Lawson, and Jesse Jones—were unlawfully denied adequate offers of reinstatement. Further, the complaint alleges that Respondent independently violated the Act by maintaining a rule that precludes employee solicitation on company property at any time, by threatening to extinguish reinstatement rights of then-unreinstated strikers if they did not furnish certain information, and by distributing a brochure to employees stating that only ''non-union'' employees are eligible for accidental death and disability benefits.

For the reasons set forth, I agree that Respondent did independently violate the Act in the three respects described above. Moreover, I conclude that a preponderance of the evidence does support the allegations that Bartels, Lawson, and Jones were unlawfully deprived of adequate offers of reinstatement, although it does not support the separate motivation allegation that Respondent did so because of testimony given by Lawson and Jones in the earlier proceeding before Judge Wacknov. Finally, a preponderance of the evidence establishes that the allegation pertaining to Rebecca Sisson is barred by the 6-month limitation period contained in the proviso to Section 10(b) of the Act.

B. *The No-Solicitation Rule*

Respondent's company policy handbook contains the following rule under the section headed ''NO SOLICITATION'':

> The Company does not permit representatives of or any charitable, fraternal, profit or nonprofit group to solicit or to distribute any material or literature to employees upon Company premises which includes parking areas, entrances, exits, or other restricted areas. There are no exceptions of this policy.

Vice President for Industrial Relations Jess Cline, an admitted supervisor and agent of Respondent, testified that he had been the person who had chosen to include that language in the handbook. He testified that he had selected one of three alternative rules submitted to him by a consulting company with whom he does business. Cline did not explain why he had felt it necessary to formulate a no-solicitation rule. He did testify that the handbook had been in continuous effect since conclusion of the strike and it has been distributed to all newly hired employees, as well as to returning strikers. In fact, the rule and the other portions of the handbook were each specifically brought to the attention of those employees, for Cline testified:

> every time someone is either hired or reinstated, I would make it a point to go through each and every part of the Company policy, so that they had a—a thorough understanding of—you know, how we were conducting our business.

In his brief, counsel for the General Counsel argues that ''the rule as to solicitation is overly broad. The distribution aspect of the rule is not challenged.'' In opposition, Respondent contends that there has been no showing that the rule was implemented, nor that anyone was coerced by it. However, the General Counsel has the better of this particu-

lar argument. As written, the rule can be read ''to give the impression that all solicitation . . . was prohibited at all times on company property. [As a result, it is] overly broad and unla[w]ful.'' *MGM Grand-Reno*, 249 NLRB 961 (1980), enfd. as modified on other grounds 653 F.2d 1322 (9th Cir. 1981). ''The governing principle is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time.'' *Our Way, Inc.*, 268 NLRB 394 (1983).

Respondent has made no ''demonstrat[ion] that a restriction [on all employee solicitation] is necessary to maintain production or discipline.'' *NLRB v. Babcock & Wilcox Co.*, 35l U.S. 105, 113 (1956). Absence of its enforcement does not nullify its facially coercive effect. For, Cline admitted that he had reviewed it with newly hired and reinstated employees in the course of reviewing the entire handbook with them. Consequently, its existence was brought to the attention of each of them and ''the mere existence of a broad no-solicitation rule may chill the exercise of employees' [Section] 7 rights.'' *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968). In this regard, Respondent has made no showing that its nonenforcement of the rule was accompanied by other events that would alert employees that, despite its breadth, the rule would only be applied in a lawful manner. Cf. *SMI of Worcester, Inc.*, 271 NLRB 1508, 1509 (1984).

Therefore, I conclude that by maintaining an overly broad no-solicitation rule, Respondent violated Section 8(a)(1) of the Act and, as a result, will order that that portion of the rule be removed from Respondent's company policy handbook.

C. *Termination of Babette Sisson's Preferential Recall Rights*

The complaint alleges, and thereby concedes, that Sisson's preferential recall rights were terminated by Respondent in early March, almost 8 months before the filing of the charge concerning, inter alia, that personnel action. Among other provisions, the proviso to Section 10(b) of the Act bars the Board from proceeding to complaint on a charge filed and served more than 6 months after an alleged unfair labor practice. Respondent contends that this serves to bar further proceedings regarding the allegedly unlawful termination of Sisson's preferential recall rights.

As is true of statutes of limitations under other statutes, the principle of equitable tolling applies to Section 10(b) of the Act. *NLRB v. Burgess Construction Corp.*, 596 F.2d 378, 383 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979). Thus, the limitations period does not begin until ''a final and unequivocal adverse employment decision is made and communicated to the employee.'' *Manitowoc Engineering Co.*, 291 NLRB 915 (1988). It is this principle which the General Counsel invokes in arguing that the charge pertaining to Sisson is not time-barred. For, argues, the General Counsel, conceding that Sisson's preferential recall rights were extinguished by Respondent in early March, she was not actually notified of that fact until July and, accordingly, the statute of limitations regarding that extinguishment was tolled for the four month period from March to July.

Yet, actual notice of an unfair labor practice is not required for the 6-month limitation period to commence running. Constructive notice suffices. *Strick Corp.*, 241 NLRB 210 fn. 1 (1979). That is, if a charging party or discriminatee ''knew, or by the exercise of due diligence should have known about the alleged unfair labor practice, the statute would not be tolled.'' *NLRB v. Burgess Construction Corp.*, supra. Here, a preponderance of the evidence establishes that both Sisson and the Union knew, or should have known, from March 2 that her preferential recall rights were terminated by Respondent. The fact that Respondent did not daily proclaim that fact from the rooftops of Sitka does not change the fact that as of March 2, at the latest, both Sisson and the Union possessed sufficient knowledge to be, ''in a position to file an unfair labor practice charge and [had to] do so within 6 months of that time rather than wait until the consequences of the act [became] most painful.'' *Postal Service Marina Center*, 271 NLRB 397, 400 (1984).

Prior to the strike, Sisson had worked as a full-time or regular operator in Respondent's secondary treatment plant or department since October 1975. The record discloses no union activity by her until she joined the strike at its inception. In January 1987, she was elected the Union's recording secretary. Although there is no evidence that Respondent had become aware of her election, Cline acknowledged that he had been aware that Sisson was aiding the Union in its presentation during the unfair labor practice hearing, that opened on March 1, in Judge Wacknov's case.

As did other striking employees, Sisson applied for reinstatement following decertification of the Union. Like other former strikers, she was placed on the preferential recall list by Respondent. Furthermore, like other former strikers, she was sent a form letter, dated June 30, 1987, advising her of her position on the recall list and, more importantly, expressly notifying her that, ''Employees will lose their eligibility for reinstatement by refusing reinstatement, accepting or refusing other equivalent employment, or engaging in serious misconduct.''

In February an opening arose for a regular operator in the secondary treatment plant. At that time George Erickson was the relief operator—a position that Environmental Engineer, and secondary treatment plant supervisor, Mark Buggins characterized as ''the bottom of the progression ladder'' for the secondary treatment plant. Consistent with the reinstatement procedure formulated by Respondent, and litigated in the case now pending decision by the Board, Respondent planned to promote Erickson to regular operator and to fill the relief operator position by offering the job to Sisson.

However, following the customary practice that had been developed during the period of its contractual relations with the Union, Respondent also posted the relief operator vacancy so that employees in other departments could bid to fill it. In this respect, Cline explained, without contradiction, that,

> When we have a job that is vacant, we put up a bid; and the people within the mill have the opportunity to bid on that job. And then the people on the Laidlaw list also are automatically bid, so to speak, and then the person who is either most qualified or they're most senior or whatever is awarded the job.

Cline testified that, in this instance, were Sisson to have accepted Respondent's reinstatement offer, ''Becky Sisson was the person to be awarded the job. . . .'' That assertion tends to be corroborated by Buggins. For, he testified that he had

been told, at that time, that no one could be transferred from any other department, nor hired, to fill the relief operator vacancy, because one person remained on the reinstatement list and she had a right of first refusal.

On Monday, February 22, Cline asked Assistant Personnel Manager Karla Parrish to telephone Sisson and arrange a meeting at which Cline could offer reinstatement to her. By that time, Sisson was working at the Sitka Post Office and did not get off work until approximately 2 p.m. As a result, Sisson could not be reached at her Sitka home by Parrish until later during the afternoon. Sisson testified that, during their conversation, Parrish had said only that Sisson should make an appointment with Cline who ''wanted to discuss future employment at the Mill.'' According to Sisson, when her questions to Parrish failed to generate adequate clarification concerning Cline's purpose for the meeting, she explained that she would not be available to come to the mill during the next few days, because her work schedule made it impossible for her to do so, and she asked Parrish to tell Cline to telephone her. Sisson did not explain, and no other evidence was presented to show, the basis for her admitted assertion to Parrish that her work schedule was too heavy to allow her to make the relatively short journey, from one location on Baranoff island to another on that same island, to meet with Cline at the mill.

Parrish denied specifically that Sisson had asked to have Cline call her. Further, Parrish gave a quite different account of her conversation with Sisson that day. Thus, she testified that, after having identified herself, she had told Sisson ''that I was contacting her to see if she would come out and talk to Jess about returning to work,'' but that Sisson had retorted that she was busy and would not be able to do so. According to Parrish, ''I told her that we had a job and we needed to talk to her about coming back to work, and we needed to do it in the next day or two, because after that Jess and I would be out of the office.''[3] In response, testified Parrish, Sisson had said, ''that she was very busy and she thought that [Parrish] was somewhat inconsiderate to call her and expect her to come right out.'' Parrish testified that she again explained that there was a ''job opening now'' and that since she and Cline ''would be away from the office . . . after the next few days, that it was important to try and meet with her.'' Although she suggested that Sisson come out in the early morning or in the later afternoon, testified Parrish, Sisson continued to maintain that she was ''too busy.'' While Sisson was called as a rebuttal witness, she did not deny any of the remarks attributed to her by Parrish. Nor did she deny that Parrish made any of these comments that the latter testified that she had made to Sisson during this telephone conversation.

Parrish reported Sisson's statements to Cline who asked Parrish to again telephone and ascertain if Sisson would provide a date and time for a meeting to discuss filling the vacancy. When Parrish did try to telephone Sisson once more, no one answered. As she prepared to leave work for the day, Parrish reported to Cline that no one was answering Sisson's telephone. Cline asked for the telephone number, saying that he intended to try calling Sisson before he went home for the day. On receiving it from Parrish, he immediately dialed the number and Sisson's husband answered. After ascertaining that she was not available, Cline asked her husband to relate to her that he wanted to speak with her and that it was important that he do so. Yet, thereafter Sisson never called Cline.

During the hearing, the matter of Cline's February 22 call to her husband took an interesting turn. Sisson was not called as a witness by counsel for the General Counsel until after Cline, called as a witness identified with an adverse party, had described his call to her husband. Thrice she then was asked if her husband had related to her that Cline had called; thrice she denied it. Called as a rebuttal witness, she again denied, during direct examination, that her husband had delivered to her any message regarding a call from the mill. However, when this subject was pursued during cross-examination, Sisson conceded that, in fact, her husband had received such a call: ''He told me today that he—he had received a call and he thought it was from Karla Parrish; that I was supposed to call out there.'' She did not explain if her husband had advanced a reason for purportedly having failed to convey this message to his wife at the time of the call. Nor was he called as a witness to corroborate her assertion that, in fact, he had not told her earlier about a call which she somewhat belatedly conceded that he had received. Obviously, he was available to testify. As quoted above, she had spoken to him on the very day that she was called as a rebuttal witness.

As he had not heard from Sisson by February 24, Cline directed that she be sent a letter that ''serves as seven (7) days notification for your preferential reinstatement to your prestrike department. You are scheduled to report to work no later than March 2, 1988.'' The letter continued on to state specifically that if Sisson failed to report, ''your name will be removed from the preferential reinstatement list,'' and invited Sisson to contact Cline if she had questions or a satisfactory reason to request an extension of the 7-day reporting period. Identically worded letters had been sent to other strikers on the recall list and the General Counsel does not contend that the 7-day reporting deadline was too short a reporting period. Indeed, it was a period that Cline decided upon at the suggestion of the Regional attorney for Region 19, based on the recall reporting period specified in Respondent's collective-bargaining contracts with the Union. Furthermore, Cline testified that an extension of the 7-day period would have been granted to any employee who advanced a valid reason, just as extensions had been granted to employees recalled from layoff prior to the strike and, it is not disputed, had been granted to at least one returning striker.

Sisson testified that she had received Cline's letter, offering reinstatement, on Friday, February 26, while at work. She claimed that during her lunch period, she had telephoned the mill in an effort to ascertain ''what this really meant. What were the specifications and such, you know wages and whatever.'' According to Sisson, her call had been answered by clerical Laurel Hansen who had said that Cline was not available because he was in meetings. Sisson testified that she had asked to please have Cline call her and Hansen had said that she would leave the message for him.

Sisson also claimed that when she had gotten off work at approximately 2 p.m. on Friday, February 26, she again had telephoned Respondent. Asked with whom she had spoken,

[3] Parrish explained that this was due to the unfair labor practice hearing scheduled to commence 7 days later.

Sisson responded: ''Probably it was Karla. It might have been Laura, again. I don't remember exactly which one.'' Sisson testified that, as before, when she had asked to speak with Cline, she had been told that he was in meetings and unavailable and, as before, she had requested that he be asked to please call her.

Sisson testified that she again had telephoned Cline on Monday, February 29, during her lunch period, but was not certain to whom she had spoken: ''It might have been Elaine. I meant it was a person I didn't recognize the voice of.'' According to Sisson, when she had asked to speak with Cline, she had been told that he was not available as he was in meetings and, again, she had requested that a message be left to have Cline call her, adding that, ''It's very urgent.''

Cline testified that, following his telephone conversation with Sisson's husband, he had received no communications from her; more specifically, he had received no message that she had tried to reach him by telephone and had wanted him to call her. Neither side called either Hansen or Elaine Stelow, at that time the two clericals in the personnel department, as witnesses. Yet, so far as the record discloses, they were equally available to each side—the General Counsel, as well as Respondent—as witnesses. Parrish denied that she had heard anything from Sisson from February 24 through 29. She testified that, as the unfair labor practice hearing was scheduled to commence on March 1, ''we told [the staff] that if Becky came and reported to work, that she was to go directly to see Mark [Buggins].'' Cline testified that while he probably had been busy during the days immediately preceding the opening of that hearing, ''I would have had time to talk to Becky Sisson.''

At no point did Sisson claim that she had made the effort to travel to the mill in order to speak with Cline. Nor did she explain why she had not done so in light of the relatively short distance there from both her workplace and her home, in light of the further fact that she got off work at approximately 2 p.m. and, obviously, Cline worked in his office until a later time of day. However, during her lunch period on March 1, and again after work that day, she did attend the hearing as a spectator. When testifying, both Cline and Parrish expressed surprise at having seen her in attendance there when she had not responded to Cline's call to her husband nor to Cline's letter of February 24. Not surprisingly, given the circumstances, Sisson made no effort to speak with Cline or Parrish and, conversely, they made no effort to communicate with her during the course of the hearing.

However, during her lunch period visit to the hearing that day, Sisson did speak with employee Bill Burns. According to Sisson, he told her that for over a week there had been a ''bid up'' for her job. Initially, Sisson testified that, when she had heard this from Burns, ''I was really shocked. . . . So, I was really shocked about that.'' However, during cross-examination, after she initially renewed that assertion, Sisson suddenly reversed field:

> Q. Then, as I understand your testimony, you—I believe you said you were—you talked to Bill Burns. And—you were shocked. I think that's what you said, right?
>
> A. Yes.
>
> Q. That that job in Secondary Treatment had been posted?
>
> A. Yes.
>
> Q. Wasn't it a fact that—that the mill posted every job opening, in terms of reinstatement?
>
> A. Yes.
>
> Q. You knew that.
>
> A. But that's not why I was shocked.

In the end, Sisson never did explain the reason for her asserted ''shock'' if it had not been that she had been told that her job had been posted for bid. Indeed, that was one of the reasons that she advanced when she rejected Respondent's reinstatement offer. For, after ''my work day ended at about 2:00'' on March 1, Sisson testified, she had ''rush[ed] home'' and prepared a letter for Cline. She then returned to the post office in time to post it for delivery to Respondent that very day. In pertinent part, that letter reads:

> I cannot return to work by March 2. There are two reasons:
>
> (1) I was not given the commonly-recognized right to submit a two-weeks notice of intent to terminate employment with my employer(s).
>
> (2) The bid for Secondary Treatment Plant Operator was posted throughout the mill prior to your letter. I understand that is probably a violation of labor law.
>
> I feel that I cannot be either a party to or condone such unprofessional actions on your part.

It is worth noting that no evidence was adduced showing that the United States Postal Service requires that it be afforded 2 weeks' notice of an employee's intention to terminate employment with it. Nor did Sisson, or the General Counsel, provide any explanation concerning the basis of her asserted belief that she was entitled to 2 weeks to submit a notice of intent to terminate her job with the Post Service.

As Sisson intended, her letter was delivered to Respondent's mill that same day. As the hearing had not yet adjourned for the day, Mill Manager Bob Allensworth delivered the letter to Cline at the hearing to which, by then, Sisson had returned as a spectator. Both Cline and Parrish inspected the letter. Both testified that they regarded it as a resignation. In a sense, Sisson expressed a similar sentiment. For she testified that she had made no further effort to contact Respondent, after sending, the letter, because ''I assumed that was just it. I thought I had done what I needed to do,'' although later she testified that she would have been willing to return to work as an operator if Respondent had ''been able to give [her] the time that [she] felt [she] needed to give notice to the Postal Service.''

However, March 1 was not ''just it'' concerning termination of Sisson's preferential recall rights. On March 18, the Union's attorney, Melinda J. Branscomb, authored a letter to Respondent's counsel which, in pertinent part, states:

> This is to confirm that Ms. Becky Sisson says she did not have sufficient time to consider the Company's offer of a job in the secondary treatment operation. I understand she only had 2-5 days to respond by the time she got the Company's letter; she needed at least two weeks' notice given her other employment. Accordingly, I understand she feels that she has not been given a meaningful offer; if the Company has an offer for her you may wish to convey this position back to

> the client so that they can contact her, accordingly, and allow her the necessary time to make a decision and make arrangements to return.

Branscomb was not called as a witness in this proceeding and she did not enter an appearance on behalf of the Union. Yet, there was no contention that she was not available to testify. This was significant for, despite Branscomb's representation in her letter regarding what ''Sisson says,'' Sisson denied flatly having spoken to Branscomb at the time of these events:

> Q. And, did you have any conversation about this matter with the attorney who was representing the various charging parties? This Melinda Branscomb?
>
> A. At that time, no.
>
> Q. Within the next few weeks did you talk to her about it?
>
> A. I don't recall, no. We were so busy with all the proceedings.

Yet, at one point Sisson equivocated somewhat concerning her portrayal of Branscomb as some type of ''Scattergood Baines'' who had intervened on Sisson's behalf in March without the latter's knowledge and authorization. For, during cross-examination, when asked if she had no further contact with Respondent after sending her March 1 letter, Sisson responded: ''Not—not directly, no.''

Of course, ''the proceedings'' did not end until April 27, well after the date of Branscomb's letter—and, also, well after the date of Respondent's counsel's reply to Branscomb. To the extent significant here, that reply states that Sisson had been treated the same ''as other returning strikers,'' but extends an invitation to have Sisson ''communicate directly with Jess Cline at the company'' if she ''has any questions concerning her eligibility for reinstatement.'' Called as a rebuttal witness, Sisson denied that she had been told by Branscomb about this reply and, after hedging and equivocating with the questions put to her, ultimately denied that she had regarded Branscomb as her attorney, at least at that time: ''Since I wasn't directly involved in the hearings, I would say they [Branscomb and one of the then-counsel for the General Counsel] represented the Union, and I was part of the Union; but not directly me.''

Respondent did not communicate specifically to Sisson that Cline and Parrish regarded her letter as a resignation. However, Sisson admitted that she had been told, by a friend of her husband's, that a vacancy had arisen because of a discharge, but that the discharged person had been rehired. Significantly, regarding this purported communication, Sisson testified that when she had heard it from her husband's friend, ''I didn't pursue this any further. I assumed they had filled it.'' In other words, she assumed that she had been bypassed for the job.

As described more fully in section III,E, supra, in July Respondent sent letters to the unreinstated strikers who remained on the recall list. Sisson did not receive one. Upon learning about these letters, she sent the same type of response that some of the unreinstated strikers were sending. She testified that she had done so because she ''didn't really know [her] status.'' In reply, Respondent sent her a form letter, dated July 28, telling her that she was not eligible for reinstatement because she had ''Refused Reinstatement.'' Sisson testified that she then turned the matter ''over to Melinda.''

Yet, 3 months elapsed before a charge against Respondent was filed respecting Sisson. As noted above, Branscomb did not appear as a witness and, consequently, the record is devoid of an explanation by her for the delay in doing so. Indeed, inasmuch as she did not appear at the hearing, the record is devoid of corroboration by Branscomb for Sisson's assertion that, in fact, she had referred the matter to Branscomb no earlier than July.

The final factual element in this scenario occurred in October, prior to the filing of the charge. At that time, testified Sisson, she had been filling out ''sort of a job application . . . like a resume[],'' and she ''wanted it to . . . agree with the Mill. And I wanted to know the terms that he had used, if he had been asked.'' To buttress this explanation, Sisson testified that, ''it had always been unclear, just what the Mill considered my cutoff date to be or what [my] status was or whether I was still on the list or whatever.'' As a result, she testified, she had telephoned Cline and had asked him for the reasons shown on Respondent's records.

In another context, Sisson's conduct in October, and her explanation for it, might have appeared quite logical. Yet, she never did explain specifically for what job she purportedly had been applying. Further, there is no objective evidence supporting her assertion that there actually had been an available vacancy for which she had been applying at that time. Nor is there any evidence supporting her claim that she actually did apply for a job in October. Instead, the record suggests that her conversation with Cline might well have been intended as a means for ascertaining whether a charge still could be filed on her behalf. For Cline testified—without contradiction by Sisson, though she testified after he had given the following testimony—that during their conversation,

> I told here, I said well, as far as I'm concerned it doesn't really matter what you write down because any information that we give out will be your dates of employment, including your date of termination on March 1 or whatever it was; and the position you had held and the rate of pay. And that's all the information we give out. Then she said, ''Well it doesn't matter anyway because during the hearing Melinda filed a charge for me.'' And I said, ''I'm not aware of any charge that Melinda filed during the hearing.'' And I said, ''And if you're making a complaint now, it's too late because the six months has expired.'' And that was the extent of our conversation.

In short, in context, it appears that Sisson called Cline less with concern about information that might be given to some phantom employer and, instead, to simply fish to ascertain Respondent's position should a belated charge be filed on her behalf.

I do not credit Sisson's assertions that she had been unaware in early March that her preferential recall rights had been extinguished. When she testified, she did not appear to be doing so candidly. Rather, she seemed to be attempting to tailor her testimony so that it would appear that, prior to July, she had not been certain of her status regarding her preferential recall rights. However, in so doing, she occasion-

ally gave internally inconsistent testimony. For example, as described above, in her March 1 letter to Cline and, again, when testifying, she expressed ''shock'' that the vacancy being offered to her had been posted. But, she retreated from this position, and denied that she had been shocked to learn that the job had been posted, after she was led to acknowledge that Respondent ''posted every job opening, in terms of reinstatement.'' Many significant assertions made by Sisson simply went uncorroborated, although the General Counsel did not claim that corroborating witnesses were not available. Thus, Branscomb never appeared to support Sisson's assertions that Branscomb had been acting on her own when she wrote to Respondent's counsel on March 18, regarding the reinstatement offer made to Sisson, and, more to the point, that Branscomb had failed to communicate that Respondent's counsel had suggested that, if she had questions concerning the reinstatement offer, Sisson should contact Cline directly. The hearing in the prior case did not conclude until well after Branscomb had received that reply. Sisson admitted that not only had she attended that hearing regularly, whenever allowed by her work schedule at the post office, but she also had been aiding—presumably, Branscomb—the presentation of the Union's case. Similarly, neither Hansen nor Stelow was called as a witness to corroborate Sisson's assertions that she had spoken to them in the course of her efforts to contact Cline on February 26 and 29, and had assertedly asked each one to have Cline return her calls. So far as the record discloses, Hansen and Stelow were as available to General Counsel as witnesses as they were to Respondent. Yet, it is not Respondent who carries the burden of proving that it did not violate the Act. Nor was her husband called to corroborate Sisson's contention that he neglected to tell her about Cline's February telephone request, belatedly conceded by Sisson as having been made, that the husband ask Sisson to call Cline.

Not only was Sisson's testimony not corroborated in material respects by other persons, but her descriptions of events lacked corroboration in other regards. Indeed, on some occasions, objective considerations refuted Sisson's accounts. For example, she testified that she had told Parrish, during their telephone conversation on February 22, that her work schedule made it impossible for her to come to the mill to meet with Cline. Yet, at no point was evidence presented to show that, at the time of her conversation with Parrish, Sisson had been obliged to work beyond her normally scheduled 2 p.m. quitting time at the Post Office. To the contrary, at the very time of that conversation, Sisson was at her home, having completed work for that day at, or near, her normal quitting time. Moreover, Sisson attended the hearing in the earlier case as soon as she got off work each day, particularly during the first week of that hearing—hardly an indication of a prolonger workday, as Sisson had portrayed her situation to Parrish. Indeed, the post office where she worked, Cline's office at Respondent's mill, the site of the hearing in the earlier case, and Sisson's home are all located in or near the city of Sitka—so close to each other that, from the description of the size of Baranoff Island, it seems illogical to infer that Sisson did not have sufficient time to go to Cline's office, just as she attended the hearing, during her lunch break or, certainly, once her work had been completed for the day at 2 p.m.

In sum, I conclude that Sisson was not a credible witness generally. More specifically, I do not credit her assertions that she had been unaware in March that Respondent had extinguished her preferential recall rights. In this respect, the Union—who, after all is the charging party in this case—did not claim that it had been unaware of that fact. To the contrary, Branscomb's March 18 letter to Respondent's counsel would have refuted any such contention, if made by it. For, in that letter, Branscomb expressly charged that Sisson had ''not been given a meaningful offer.'' Consequently, in March, the Union was ''in a position to file an unfair labor practice charge,'' *Postal Service Marina Center*, supra, but it did not do so until over 6 months later. Similarly, like other strikers, Sisson had been told that she would ''lose [her] eligibility for reinstatement by refusing reinstatement'' in the form letter sent to her on June 30, 1987. More to the point, in his February 24 letter, Cline again made that consequence plain by reminding Sisson that her ''name [would] be removed from the preferential reinstatement list'' if she failed to report for work in response to his ''notification for your preferential reinstatement to your prestrike department.'' At no point did Sisson claim that she had not understood what Cline was saying in his letter. Nor did she claim that she did not believe what he was telling her in that letter.

Furthermore, there is no basis for concluding that Sisson had not appreciated the consequences under the Act of Respondent's reinstatement offer. In her March letter, she specifically accused Respondent of having made an offer ''that is probably a violation of labor law.'' True, her reason for asserting that conclusion may not have been a correct one under the Act—or, at least, not one that is consistent with the General Counsel's theory for contending that the offer was not an adequate one. Nevertheless, the crucial point is that by March 1 Sisson believed that Respondent had violated the Act. But, no charge regarding the reemployment offer was made until almost 9 months later. Instead, having written and posted her own letter to Cline, she admittedly ''assumed that was just it.''

In his brief, counsel for the General Counsel argues that because Respondent's February reinstatement offer was not one made to a substantially equivalent position, it cannot serve to extinguish Sisson's reinstatement rights. Instead, her right to reinstatement was a continuing one. However, that is a parallel argument to the one rejected by the Supreme Court in *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960). There, a collective-bargaining contract with a representative of less than a majority of the bargaining unit employees had been executed more than 6 months before the charge had been filed, although it had been maintained and honored throughout the subsequent 6-month statutory limitation period. The Court (at 422) concluded that the Board was barred from making ''a finding of violation which is inescapably grounded on events predating the limitations period [because that would be] directly at odds with the purposes of the 10(b) proviso.''

Here, the personnel action alleged to have violated the Act is Respondent's termination of Sisson's reinstatement rights. Accordingly, any violation, and remedy therefor, must be based on that particular action. No action within the 6-month period preceding the charge added to, or subtracted from, the action of terminating Sisson's right to recall. Just as mere maintenance of a contract does not perpetuate the unlawful-

ness of its execution, so too an ongoing refusal to reinstate a striker does not serve to continue, and thereby preserve, the earlier act of having extinguished that striker's recall right on the basis of a purportedly invalid reinstatement offer. A conclusion that the reinstatement offer was not adequate would be ''inescapably grounded on events predating the limitations period [and, thus,] directly at odds with the purposes of the 10(b) proviso.'' Id.

In rejecting Cline's February 24 reinstatement offer, Sisson may have acted from a number of motives: from loyalty to other union supporters, from a sense of indignity about Respondent's acts, from a desire to show support for the Union in its imminent hearing before the Board. Moreover, her motive is not important. Nor, for that matter, is Respondent's, or more particularly Cline's, motive significant. For, a preponderance of the credible evidence establishes that Respondent had been willing to reinstate Sisson and had a vacancy to which it, at least, believed that she could be reinstated in March; that it had offered to reinstate her; that she had been put on notice, and understood, that her reinstatement rights would be extinguished by Respondent if she did not accept that offer; that she had rejected that offer, protesting that she regarded it as an unlawful one; that the Union had been aware of the offer and had understood that Sisson regarded it as not ''a meaningful'' one; and, finally, that no charge had been filed for almost 9 months after Respondent, as it warned Sisson that it would do, had extinguished her right to consideration for reinstatement. In these circumstances, both Sisson and the Union ''knew, or by the exercise of due diligence should have known about the unfair labor practice,'' *NLRB v. Burgess Construction Corp.*, supra, and were ''in a position to file an unfair labor practice charge,'' *Postal Service Marina Center*, supra. Their delay in doing so bars the Board from consideration of whether Respondent violated the Act in March by extinguishing Sisson's recall rights as a former striker. ''As expositor of the national interest, Congress . . . barred the Board from dealing with past conduct after that [6-month period preceding filing of a charge] had run, even at the expense of the vindication of statutory rights.'' *Machinists Local 1424 v. NLRB,* supra at 429.

D. *Failure to Offer Reinstatement to John Bartels*

The complaint alleges that Respondent has hired individuals without preferential hiring rights while failing to offer reinstatement to John Bartels, an oiler in the maintenance department prior to the strike. Respondent agrees that it did not offer reinstatement to Bartels in 1988, but instead bypassed him during that year. However, it argues that the only maintenance department position available after the strike had been the multicraft general maintenance one and, further, that Bartels had announced that he would not accept any maintenance position other than the no longer existing one of oiler. Consequently, urges Respondent, its failure to offer reinstatement to Bartels during 1988 did not violate the Act, because he had been unwilling to accept work in the only available position to which it could have reinstated him.

''If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement.'' *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967). An offer of reinstatement must be unconditional and this is so in both the context of an offer made to a discriminatee. *Shelly & Anderson Furniture Mfg. Co. v. NLRB,* 497 F.2d 1200, 1204 (9th Cir. 1974), and of an offer of reinstatement made to strikers seeking to return to work. *Presto Casting Co. v. NLRB*, 708 F.2d 495, 498–499 (9th Cir. 1983). Moreover, the duty to offer reinstatement is not excused by employer misgivings regarding ability to perform the available work. Once reinstated, if the employee cannot perform the work, the employer ''may act accordingly.'' *Brooks Research & Mfg.*, 202 NLRB 634, 637 fn. 13 (1973). For, the obligation to make an offer of reinstatement ''preempts . . . speculation as to qualification.'' *Lehigh Metal Fabricators*, 267 NLRB 568, 575 (1983). See also *Wright Tool Co.*, 282 NLRB 1398, 1405 (1987). So, too, does it preempt reliance on employees' abstract statements of unwillingness to accept reinstatement, if offered, as an excuse for failing to make the statutorily required offer of reinstatement. Both the public interest in protecting the statutory right to strike and protection of strikers' rights to reinstatement require that striker statements of unwillingness to accept reinstatement by discounted until tested by the crucible of an actual offer of reinstatement. See, e.g., *Heinrich Motors*, 166 NLRB 783, 785 (1967), enfd. 403 F.2d 145 (2d Cir. 1968).

Prior to the strike, John Bartels had been working for 10 years as an oiler. At the time the strike commenced, he had been classified as plant A, oiler leadman. Bartels never held union office and, so far as the record discloses, never engaged in any unique form of protected activity that might have generated animus specifically against him by Respondent or its officers. As did other employees, he joined the strike at its inception and remained on strike continuously until, after the Union had been decertified, those employes made unconditional offers to return to work.

For a number of years Respondent had sought to eliminate the separate classification of oiler. Eventually, before the strike, the then-classified oilers were offered training as millwrights, leaving those who declined that training red-circled as oilers for the duration of their employment with Respondent. Bartels admitted that he had been offered, and declined, training in other craft skills even though, in 1985, he had been offered an hourly incentive to accept that training. As was the fact with all maintenance department classifications, after decertification of the Union, Respondent eliminated the separate classification of oiler, merging its functions into the multicraft classification of general mechanic.

By May, Bartels' name had surfaced, or was near to surfacing, on the preferential recall list. Consequently, Cline summoned him for a meeting. Bartels and Cline agreed that two subjects were discussed during this meeting: willingness to perform multicraft work and, second, willingness to accept a production job until an apprenticeship program was instituted. Moreover, although there was disagreement regarding what Bartels had said about his willingness to perform multicraft work, both witnesses agreed that Cline did not actually make an offer of reinstatement to Bartels for the position of general mechanic.

Bartels was interrogated five times—on direct, cross, redirect, recross and further redirect examination—concerning what had been said that day. During direct examination, he testified that Cline had explained that Respondent had implemented a multicraft program with the result that there was no separate oiler position; had said that there were openings in production that Bartels could fill and that Bartels could

have some time to think over whether he wanted to accept one of those jobs, to which the latter replied that he would ''think about it''; had asked if Bartels possessed any other maintenance skills, to which Bartels replied that he probably could be a helper; and, had said that Respondent lacked the money for an apprenticeship program in maintenance at that time, but was ''thinking about'' instituting one and had asked if Bartels would consider something like that, to which Bartels replied: ''I don't know.'' Bartels testified that he later had called Cline and, with reference to the latter's offer of a production job, had said that, ''I'd wait for an oiler position to open up.''

During cross-examination, Bartels was led more carefully through this conversation:

> Q. Now, I believe you indicated you had a discussion, what was it, last—May of—'88 with—with—with Cline about coming back to work?
>
> A. Yes.
>
> Q. Okay. And he—he offered you—various production jobs. Is that correct?
>
> A. Yes.
>
> Q. And you told him no, you were only interested in oiling. Is that correct?
>
> A. Yes.
>
> Q. Okay. And—I'm [sic] I correct that you told him you were—you would only come back to the mill as an oiler, you weren't interested in production?
>
> A. Yes.
>
> Q. And he explained to you we don't have pure oilers anymore, right?
>
> A. Yes.
>
> Q. He said we have multi-crafting. Is that correct
>
> A. Yes.
>
> Q. And that you have to—have to—have to learn to do other jobs, right?
>
> A. Yes.
>
> Q. And didn't you tell him words to this effect, that—that you'd been trained as an oiler, you'd always done oiling and—and you didn't want to do anything else but oil. Isn't that what you told Mr. Cline?
>
> A. Yes.
>
> Q. And then Mr. Cline said, ''well, we're going to start up the apprenticeship program and—and—and would you be interested in that, John?'' And you said, ''I'd let you know.'' Right?
>
> A. Yes.

During redirect examination, Bartels testified that, during this conversation, he had not been offered an apprentice position and had not said that he would not work on one: ''I said I would consider [it] if it came up.'' During recross examination, Bartels agreed that, during this conversation, he had said that he was an oiler, Respondent had trained him as an oiler and he only wanted to come back as an oiler. But, during further redirect examination, he claimed—inconsistently with his above-quoted testimony during cross-examination—that he had made that statement in the context of an offer of a production job.

Cline was interrogated regarding this conversation only once: when called as an adverse witness by the General Counsel. He testified that he had explained that he was obligated to ascertain if Bartels was qualified for the jobs that were available, in light of the fact that the latter was to be considered for reinstatement. Then, testified Cline, he had said that the only classification in the maintenance department was that of general mechanic. According to Cline, after he had made that statement,

> what John told me right then was ''Hey, I'm an oiler. You trained me. You've made me what I am. I have no other skills, and I'm not interested in anything else.'' So I told him, I said, ''Well, I could offer you a job in production and at some point later on down the road we will probably reinstitute the apprenticeship program, and at that time we would consider to put you into it.'' And he said he'd think about it. And I said, ''Okay, let me know.'' And he called back later and said that he was not interested. I said okay.

Cline conceded specifically that, during their conversation, he had said that he would not, or could not, offer Bartels a position as a general mechanic.

Had Cline actually offered Bartels a job as general mechanic in May, this might well have ended all further question concerning Respondent's obligation to reinstate Bartels. For, despite the General Counsel's efforts to repair the damage, as reproduced above, Bartels admitted that when Cline had said that duties other than oiling had to be learned to be eligible for a job as general mechanic in the maintenance department, he (Bartels) had replied that he did not want to do anything else but oil. Of course, in the context in which it was made, Bartels' statement was no more than an expression of preference, rather than a flat assertion of unwillingness to accept such work, if offered. Indeed, ultimately Respondent did offer Bartels a position as an apprentice in the maintenance department. That occurred in January 1989. And, after giving the matter some thought, Bartels accepted that offer and returned to work. That acceptance negates any speculation that, had Respondent actually offered Bartels reinstatement in an apprenticeship program in May, he would have rejected that offer.

Of course, if Respondent truly have lacked the money in May to initiate an apprenticeship program, then there could be no violation here, at least on the theory that Respondent had been unwilling to offer an apprentice's position to Bartels. Yet, Respondent presented no evidence that it had lacked money in May to institute an apprenticeship program to train employees to be general mechanic. To the contrary, there is evidence that Respondent had been training other employees in additional maintenance skills at, or near, the time that Cline spoke with Bartels.

Respondent did not describe what had been meant by Cline's reference to an apprenticeship program—did not describe the elements of that program and what duties were to be performed while it was in progress. As a result, the only evidence regarding that program's content is derived from the actual work performed by Bartels following his return to work in January 1989. At that time, he was told that he would be participating in the apprenticeship program and would be rotated through various departments where he could learn to perform maintenance duties in addition to oiling. So far as the record discloses, that type of rotation was the sum and substance of Respondent's apprenticeship program.

Yet, at almost the same time as Cline was meeting with Bartels, at least two other employees were rotating, or were about to start rotating, through maintenance functions. Thus, former carpenter Gary Smith, who earlier had accepted a production job with Respondent, was transferred to the maintenance department and began rotating through the various departments, in each case working with a more experienced maintenance person who showed him how to do the maintenance work that had to be performed in that particular department. This continued for 10 or 11 weeks. Similarly, at about the same time as Bartels was meeting with Cline, former painter Ron Owen was moved from his interim production job to the paint shop where, after 2 or 3 weeks of painting, he was rotated through different departments, learning such skills as pipefitting and millwrighting. At no point did Respondent explain why it had been able to rotate at least two other people through such a training program, but had been unable to do so for Bartels. To the contrary, Mill Manager Allensworth testified that rotation had been an ongoing feature of maintenance employees' reinstatement.

Based solely upon his remarks to Cline in May, Respondent argues that Bartels had been unwilling to participate in an apprenticeship program to acquire multicraft skills, thereby rendering himself ineligible for the only maintenance position in which he could have been employed. Yet, regardless of what Bartels may have said at that time, it was not said in response to an offer of reinstatement. Cline admitted that one had not been made during their conversation. At best, he merely inquired if Bartels would be interested in participating in such a program were one to be instituted. ''[A]n inquiry as to whether an employee is interested in employment [does not] constitute an unconditional offer.'' *Montgomery County MH/MR Emergency Service*, 239 NLRB 821, 827 (1978). Regardless of what Bartels may have said in May, when the issue of participation in an apprenticeship program was presented to him in hypothetical fashion, the fact is that when he was confronted with an actual offer to participate in such a program, he accepted. Given Respondent's obligation to make an offer of reinstatement, even were it to be concluded that Cline had been acting in good faith, and had been misled by Bartels' comments, that would not enhance Respondent's position.

As a striker who had offered to return to work, Bartels was entitled to receive an unconditional offer of reinstatement. Because Respondent did not make such an offer at a time when jobs were available, and when other employees actually had been participating in a rotation program—the same type of program to which Bartels later was assigned under the nomenclature of an apprenticeship program—I conclude that a preponderance of the evidence established that Respondent violated Section 8(a)(3) and (1) of the Act when it bypassed his name on the preferential recall list and did not make an offer of reinstatement to him until January 1989.

E. *The July Letter Sent to Employees Remaining on the Preferential Recall List*

On July 20, Respondent sent the following letter to the nine employees, excluding Bartels with whom Cline had spoken personally in May, whose names remained on the preferential recall list:

> It has now been over two years since you last worked for the Company and during that period of time the nature of many jobs has changed.
>
> It is our desire to place you into a job which you are qualified to perform and to do that we need an update of your relevant employment history since July 11, 1986.
>
> In the event you do not have a continuing interest for reinstatement and indicate such, we will attempt to assist you in finding other employment, such as providing you reimbursement expenses for an airline ticket to seek other employment.
>
> Please advise us of either your work experience from July 11, 1986 or your interest in job search reimbursement monies.
>
> If you fail to respond by August 1, 1988 we will assume you have abandoned employment with us and that you also have no interest in any monetary assistance.

Cline testified that this letter was no different than an inquiry about job applicants' experience and qualifications. That is, since these nine individuals had not worked for Respondent for 2 years, testified Cline, the letter represented no more than an effort to acquire more current information concerning their experience and qualifications.

The difficulty with the letter is its last paragraph. There is ''no reason why [an employer] cannot at reasonable intervals request the employees on the preferential hiring list[] to notify it whether they desire to maintain their recall status.'' *Brooks Research & Mfg.*, supra, 202 NLRB at 637. However, ''an employer may not require replaced economic strikers to respond to such a request or risk losing their reinstatement rights.'' *Charleston Nursing Center*, 257 NLRB 554, 557 (1981). Of course, this is precisely what the last paragraph of Respondent's letter does threaten, albeit in the expressed context of providing updated information concerning job experience.

A notice requirement is inherently destructive of employees' statutory rights and is permitted under the Act only where a valid business justification is established. See, e.g., *Giddings & Lewis, Inc. v. NLRB*, 710 F.2d 1280, 1285–1286 (7th Cir. 1983). This Respondent has failed to do. That is, it has failed to show, for example, that its growth and progress would be impeded without that information. At best, Respondent has shown no more than that possession of this information would make administration of the recall procedure more convenient. However, '''administrative convenience'. . . does not rise to the level of legitimate and substantial business justification.'' Id. at 1286.

For over a year before this letter was sent, Respondent had been reinstating employees from the preferential recall list without insisting that they provide that type of information in advance of being recalled. There is no objective basis for concluding that there had been a valid business justification for insisting that these nine employees do so. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act by telling employees that their reinstatement rights will be deemed abandoned if they do not provide information concerning their work experience since July 11, 1986.

F. *The Failure to Reinstate John W. Lawson and Jesse Jones*

Considerable evidence was adduced, and considerable argument in the briefs was devoted to, the allegations covered in this subsection. Much of that evidence and argument was targeted at analyzing, and attacking, the motives of the witnesses for the other side. Indeed, at times it rises to the level of sheer speculation and a not-so-subtle mudslinging. Yet, in the final analysis, resolution of these allegations is governed by the principles already explicated in the preceding two subsections. That is, Cline admitted that, during his separate meetings with Lawson and Jones, he had not made an offer of reinstatement to either man. Instead, he had attempted to question them concerning their qualifications, thereby creating the impression that he was seeking, through these meetings, to obtain the very information that he had sought to obtain in the letters sent 2 weeks earlier to employees who remained on the preferential recall list. They refused to answer his questions, feeling that they were not obligated to do so. As a result, mini-impasses were created in both cases. Yet, it was Cline who was responsible for these impasses by demanding this information as a condition to reinstatement offers.

Prior to the strike, Lawson had worked for Respondent for 15 years. During the last 10 of those years he had been a leadman in the machine shop. Aside from participating in the strike from its inception, Lawson had been a shop steward and a member of the negotiating and standing committees. He also had been called as a witness for the General Counsel during the prior hearing involving Respondent.

Jones had worked continuously for Respondent since 1986. At the time of the strike he was a pipefitter. He also was president of the Union at the time that the strike had been called and previously had served as its vice president. Like Lawson, Jones had appeared as a witness during the earlier hearing.

Both men remained on the preferential recall list on July 20. As a result, each one received a copy of the letter from Respondent described in section III,E, supra. On July 27, each one sent a reply which read: ''I hereby request that my name remain on the preferential hiring list for any pre-strike job, or a substantially equivalent job.''

By the beginning of August, additional general mechanic jobs had become available. Cline asked Parrish to telephone Lawson and Jones to arrange for separate meetings with them. Parrish called Lawson and, then, Jones, explaining that she wanted to arrange a meeting with Cline to discuss reinstatement. Both men agreed to a meeting on the following day, Lawson at 9:30 a.m. and Jones at 3:30 p.m. Early the following morning Lawson telephoned Parrish and asked if she would have Cline call him before the meeting. Lawson testified that, in thinking the matter over, he had become interested in what Cline wanted to discuss. Parrish agreed to have Cline call Lawson. However, Cline did not arrive at work until almost 9:30 a.m. By then, Lawson already was at the mill for the meeting.

The accounts of that meeting between Lawson and Cline vary in many respects. However, they do correspond with regard to the fact that Lawson declined to answer Cline's questions about qualifications and with regard to the further fact that Cline did not make an offer of reinstatement to Lawson. Thus, Lawson testified that Cline had said that he understood that Lawson had called Parrish and had asked if that meant that Lawson did not want to talk to him (Cline). According to Lawson, he answered,

> Jess, I come out here with the hopes of getting a job, and yes I want to talk to you if it's about a job that you have to offer me or any type of employment. If it's just about the letter wanting information, at this time I don't have anything to say. If you want to get into that aspect of it, I wish you'd go through Melinda Branscomb.
>
> . . . .
>
> Jess says, ''I can't offer you a job if you won't talk to me.'' I said, ''Jess, that's what I came out here for. If you want to offer me a job, I'm willing to talk to you about anything.'' And he said somewhat like, ''You're being hostile towards to me? You won't talk to me.'' I said, ''Jess, that's what I come our here for. If you've got a job, I'm here to talk about anyway.'' He says, ''End of conversation.'' I said, ''Okay,'' got up and was walking through his door, and in a rather loud voice he said, ''I'll be sending you a letter.''

In contrast, Cline described the significant portion of their meeting as follows:

> I asked him if he would come into my office and discuss reinstatement; and he walked into my office and he had a seat. And told me that his attorneys, Pat Dunham of the Labor Board and Melinda Branscomb with the UPIU, had advised him or them, I can't remember which it was, that they did not have to answer any of my questions. And I told John that I was under an obligation to seek out people who were on the *Laidlaw* list make a determination if they are qualified for the jobs that I had. And that if he refused to engage in any dialogue with me that I would be unable to make that assessment and, therefore, I could not offer him reinstatement. He told me, again, that his attorneys, the Labor Board, and the UPIU, had given him this advice and not to cooperate with me by responding to my questions. And then he aid, ''You know, Jess, in your case when your attorneys advise you to do something, you go along with whatever advice they give you.'' And I said, ''Well, this conversation is over with then.''

Most significantly, Cline testified that he did not recall whether Lawson had asked, as the latter said that he had done, if Cline had a position to offer him (Lawson) and, further, did not recall whether Lawson had said that he would be willing to talk about a job if Cline had one to offer him.

Less dispute existed regarding the more heated exchange that occurred during the conversation that afternoon between Jones and Cline. Cline said that he had brought Jones out to talk about reinstatement and had to know what Jones had been doing for the past 2 years. Jones asked if he was being offered a job[4] or if Cline was just fishing for information, adding that he did not intend to answer Cline's questions but if Cline would write them out, he (Jones) would take them

[4] Cline testified that he did not recall whether he had been asked that question by Jones.

home and decide whether or not to answer them. Cline replied that he intended to treat Jones as other strikers had been treated and, consequently, did not intend to write out the questions. Cline pointed out that Respondent's maintenance operations had changed and that he needed answers to his questions so that he could ascertain what Jones had been doing and if he was qualified to perform the available jobs at the mill. Jones retorted that the same type of work was being performed at the mill and that pipefitting work still was being done there. Cline denied that a separate pipefitter job still existed and Jones asserted that he had proof that such jobs still did exist. As might be suspected, their conversation ultimately concluded with Jones refusing to answer Cline's questions regarding the work that he (Jones) had performed since the strike and with Cline not making an offer of reinstatement.

The General Counsel argues that Cline refused to make an offer of reinstatement to Lawson and Jones because of their particular union activities and, also, because of their role in the earlier proceeding involving Respondent. However, there is no evidence that Cline's actions on September 3 had been motivated by either of these considerations. Conversely, Respondent argues that, based on certain statements by Lawson and Jones on other occasions, neither one of them was willing to accept reinstatement unless permitted to continue performing only the work that they had been performing prior to commencement of the strike. But each of them testified that, by September 3, he had been willing to work as a multicraft general mechanic and there is no evidence that refutes that testimony.

What the record does show is that all three participants in these two meetings—Cline, on one side, and Lawson and Jones, on the other—continued to be concerned about the information sought by Respondent's July 20 letter, described in section III,E, supra. That is, Cline continued to insist that Respondent be provided with that information and, conversely, Lawson and Jones believed that Cline was simply utilizing the meetings as a device for obtaining information that they had been told need not be provided as a condition of reinstatement.

As concluded in section III,E, supra, it is an unfair labor practice to threaten to extinguish reinstatement rights if unreinstated strikers will not submit information demanded by the employer—unless there is a valid business justification for that information. Accordingly, had Respondent established that it needed information concerning the activities of these two employees since commencement of the strike, a different result might be warranted. But Respondent did not do so. At no point did Respondent specify the jobs that were available, or were expected to be available, as of August 3. Nor did it particularize the types of skills that would be required of those jobs. Accordingly, there is no basis for concluding that Cline had a need to withhold offers of reinstatement until he could ascertain the information sought by his questions to Lawson and Jones.

Indeed, ultimately Cline expressly admitted that it was not important, at all, what type of work Lawson and Jones had been performing after the strike had commenced:

> Q. What—hypothetical—ask you a hypothetical question. What would Mr. Jones and Mr. Lawson have had to do to be working at the mill right now, and avoided this lawsuit? What would have, in your mind, had to have happened on August 3?
>
> A. On August 3, that's the day that they both came into the office.
>
> Q. Right.
>
> A. And if they would've told me that they would have been willing to work up to their capabilities, they would be working today.
>
> Q. If they would be willing to work at a primary skill, is that correct?
>
> A. Work at a primary skill and work up to their capabilities in any . . . .
>
> Q. Work at . . . .
>
> A. . . . any type of secondary skills. And—you know, work within the—the confines of the mechanics package. It's very—relatively simple.
>
> Q. And what if they had said to you, you know, we haven't been doing anything during the strike? We have no—we didn't take any other courses or anything like that? Would that have affected . . . .
>
> A. It—it wouldn't've—it wouldn't've mattered.

Yet, at no point did Cline testify that he had asked either Lawson or Jones if they would be ''willing to work up to their capabilities.'' Rather, his own description of his conversations with each of them show that his questioning had sought only retrospective, not prospective, information.

As set forth in section III,D, supra, if an employer has doubts that a former striker will accept reinstatement, those doubts are to be tested by making an offer of reinstatement—not by refraining from doing so and then speculating what would have occurred had such an offer actually been made. Here, Respondent did not offer reinstatement to either Lawson or Jones. Cline's refusal to do so appeared less rooted in concern about the two former strikers' willingness to perform multicraft work than upon their unwillingness to supply information that he ultimately admitted, was not germane to performance of the jobs to which they could have been reinstated. In these circumstances, a preponderance of the evidence establishes that by refusing to make an offer of reinstatement to Lawson and Jones, Respondent violated Section 8(a)(3) and (1) of the Act.

G. *Distribution of the Accidental Death and Disability Policy*

Among the materials distributed to employees—both newly hired and reinstated ones and those already working for Respondent—during the last half of 1988 was a brochure describing the newly instituted accidental death and disability policy. The subsection of that booklet entitled ''ELIGIBILITY'' provides: ''You are eligible for this insurance if You [sic] are an active, full-time hourly non-union employee.''

Respondent does not challenge the General Counsel's allegation that, on its face, this provision violates the Act. Nor could it do so. ''An employee benefit which is restricted to nonunion employees is normally a per se violation of Section 8(a)(1).'' *Libbey-Owens-Ford Co.*, 285 NLRB 673 fn.2 (1987). Such a provision ''interfere[s] with, restrain[s] and coerce[s] employees in the exercise of their right to be represented by a labor organization . . . [by] plac[ing] a penalty on such action.'' *Melville Confections, Inc. v. NLRB*, 327

F.2d 689, 691 (7th Cir. 1964). Nothing in the language of the eligibility restriction in this provision suggests that continued coverage would be left to collective bargaining. Cf. *Handleman Co.*, 283 NLRB 451, 452 (1987). Nor is there evidence of events that would naturally put employees on notice that such benefits might be perpetuated through collective bargaining. Cf. *A. H. Belo Corp.*, 285 NLRB 807 (1987); *NLRB v. Rochester Institute of Technology*, 724 F.2d 9, 11–12 (2d Cir. 1983).

The fact that there is no evidence that respondent was unlawfully motivated in distributing the brochure—or, for that matter, in its preparation—does not serve to erase the impact of its eligibility restriction under the Act. For even where ''there is no reason to assume that the distribution of the plan was unlawfully motivated, the communication and the continued existence of such an exclusionary eligibility requirement necessarily exert a coercive impact on the employees.'' *Niagara Wires*, 240 NLRB 1326, 1328 (1979).

During the hearing, Respondent adduced evidence that toward the end of 1988, it had requested that the phrase ''nonunion'' be deleted from the eligibility subsection and that it be sent new brochures containing that deletion. Moreover, after the charge was filed, its nurse crosses out those words whenever she distributes a brochure to a new employee and, indeed, whenever she issues a replacement brochure to an employee who already has received one. Yet, Respondent admits that it has not notified its employees generally of the change. Consequently, employees who received brochures before the nurse began deleting the phrase, and who have not needed replacement brochures, have no knowledge of the deletion, so far as the evidence discloses. Moreover, Respondent has not presented evidence that, in connection with the deletion, it has assured employees that it will not interfere in the future with their Section 7 rights. By failing to have taken these two steps, Respondent precludes any finding that it has effectively repudiated its violation of the Act in this area. See *Passavant Memorial Hospital*, 237 NLRB 138 (1978).

CONCLUSIONS OF LAW

Alaska Pulp Corporation commited unfair labor practices affecting commerce by failing to make adequate offers of reinstatement to former strikers John Bartels, John W. Lawson, and Jesse Jones, in violation of Section 8(a)(3) and (1) of the Act, and, further, by maintaining an overly broad no-solicitation rule, by threatening to extinguish reinstatement rights of former strikers who fail to submit information concerning their work experience since commencement of the strike, and by telling employees that accidental death and disability benefits were available only to nonunion employees, in violation of Section 8(a)(1) of the Act. However, the 6-month limitation portion of the proviso to Section 10(b) bars consideration of the termination of Rebecca Sisson's reinstatement rights and, furthermore, a preponderance of the evidence does not support the allegation that Lawson and Jones were deprived of adequate offers of reinstatement because of their testimony in an earlier unfair labor practice proceeding.

REMEDY

Having found that Alaska Pulp Corporation engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act.

With respect to the latter, it shall be ordered to offer to John Bartels, John W. Lawson, and Jesse Jones immediate and full reinstatement to the position to which each one would have been reinstated had he not been deprived of an adequate offer of reinstatement, dismissing, if necessary, anyone who may have been hired or transferred to perform the work to which he would have been assigned. Moreover, if those positions no longer exist, it shall be ordered to reinstate Bartels, Lawson, and Jones to substantially equivalent positions without prejudice to their seniority or other rights and privileges. It also shall be ordered to make Bartels, Lawson, and Jones whole for any loss of pay they may have suffered because they were unlawfully deprived of adequate offers of reinstatement. Backpay shall be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be paid on the amount owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

In addition, Alaska Pulp Corporation shall be ordered to remove the offending portion of the ''NO SOLICITATION'' section from its company handbook and to distribute new copies of that handbook, with the rule removed, to all employees. It shall also be ordered, to the extent that it has not done so already, to remove the phrase ''non-Union'' from the ''ELIGIBILITY'' section of the voluntary accidental death and disability brochures and to distribute copies of that revised brochure to all employees. Finally, as not all employees who received the July 20 letter have been reinstated, Alaska Pulp Corporation will be ordered to mail copies of the attached notice to all employes who received that letter and who are still awaiting offers of reinstatement.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended[6]

ORDER

The Respondent, Alaska Pulp Corporation, Sitka, Alaska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to make adequate offers of reinstatement to economic strikers who have applied to return to work, including John Bartels, John W. Lawson, and Jesse Jones, whenever work is available to which they can be reinstated.

(b) Maintaining no-solicitation rules that prohibit employees from soliciting for any purpose on company property at any time.

(c) Threatening to extinguish the reinstatement rights of striking, or formerly striking, employees because they do not submit information concerning their work experience since commencement of a strike.

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[5] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. I leave for the Board's consideration the General Counsel's request that the existing procedure for calculating interest be discarded in favor of compounding it on a daily basis.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Telling employees that only nonunion employees are eligible for accidental death and disability benefits, or for any other employee benefit.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent not already done so, offer John Bartels, John W. Lawson, and Jesse Jones immediate and full reinstatement to the employment positions from which each of them was unlawfully deprived of an adequate offer of reinstatement, dismissing, if necessary, anyone who may have been hired or transferred to perform the work which they would have been performing had they been extended adequate offers of reinstatement or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as the result of the discrimination against them, in the manner set forth above in the remedy section of this decision.

(b) Preserve and make available to the Board or its agents, for examination and copying, all payroll and other records necessary to compute the backpay and reinstatement rights as set forth in the remedy section of this decision.

(c) Expunge from the company policy handbook that portion of the ''NO SOLICITATION'' section that prohibits employees from soliciting for any purpose upon company property at any time and distribute a copy of the handbook with the rule so revised to all employees.

(d) Expunge from the ''ELIGIBILITY'' section of the Voluntary Accidental Death and Disability brochures the phrase ''non-union'' and distribute a copy of that brochure so revised to all employees.

(e) Post at its Sitka, Alaska facility copies of the attached notice marked ''Appendix B.''[7] Copies of the notice on forms provided by the Regional Director for Region 19, after being signed by its authorized representative, shall be posted by Alaska Pulp Corporation immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that those notices are not altered, defaced, or covered by any other material.

(f) Mail copies of the notice to all employees who received copies of the July 20 letter, described in section III,D, supra, and who have not been reinstated.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Alaska Pulp Corporation has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to make adequate offers of reinstatement to economic strikers who have applied to return to work, including John Bartels, John W. Lawson, and Jesse Jones, whenever work is available to which they can be reinstated.

WE WILL NOT maintain no-solicitation rules that prohibit employees from soliciting for any purpose upon company property at any time.

WE WILL NOT threaten to extinguish reinstatement rights of striking or formerly striking employees because they do not submit information concerning their work experience since commencement of a strike.

WE WILL NOT tell you that only nonunion employees are eligible for accidental death and disability benefits, nor for any other employee benefit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John Bartels, John W. Lawson, and Jesse Jones immediate and full reinstatement to the employment positions from which each of them was unlawfully deprived of an adequate offer of reinstatement, dismissing, if necessary, anyone who may have been hired or transferred to perform the work which they would have been performing had they been extended adequate offers of reinstatement or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay they may have suffered as the result of the discrimination against them, with interest on the amounts owing.

WE WILL remove from the company policy handbook that portion of the ''NO SOLICITATION'' section that prohibits employees from soliciting for any purpose upon company property at any time and WE WILL distribute a copy of the handbook to each of you with the rule so revised.

WE WILL remove from the ''ELIGIBILITY'' section of the voluntary accidental death and disability brochures the phrase ''non-union'' and WE WILL distribute a copy to each of you with that section so revised.

ALASKA PULP CORPORATION